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Order 2002-4-4

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 4th day of April, 2002

SERVED: April 4, 2002

U.S.-U.K. Alliance Case	Docket OST-2001-11029
Joint Application of American Airlines, Inc. and British Airways Plc for statements of authorization and related exemption authority	Docket OST-1999-6507

FINAL ORDER

By this Order, we (1) grant the motions of American Airlines and British Airways (hereafter collectively referred to as "AA/BA") to dismiss their Joint Applications in Dockets OST-01-11029 and OST-1999-6507, (2) deny the motion of Continental Airlines (Continental), Delta Air Lines (Delta) and Northwest Airlines (Northwest) to dismiss the applications for approval and antitrust immunity filed by United Air Lines (United), British Midland Airways Limited d/b/a bmi British Midland (bmi) and their affiliates in Docket OST-01-11029, and (3) grant final approval and antitrust immunity for alliance agreements between United Air Lines, British Midland Airways Limited, Austrian Airlines Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa AG, and Scandinavian Airlines System (hereafter collectively referred to as "United /bmi") and grant the carriers the necessary regulatory authorities for their proposed reciprocal code-share services, subject to the limits and conditions described below, including the condition that within six months from the date of issuance of this Order the United States achieves an Open Skies agreement with the United Kingdom that meets U.S. aviation policy objectives.

I. Background

A. The Applications

On August 10, 2001, AA/BA filed a joint application seeking approval of and antitrust immunity for their Alliance Agreement. They acknowledged that their application is premised on the achievement of an Open Skies agreement between the United States and the United Kingdom, and stated that their Alliance Agreement establishes the contractual framework for comprehensive collaboration and coordination between the two carriers in a global alliance.

On September 5, 2001, United/bmi filed an application seeking approval of and antitrust immunity for an Alliance Expansion Agreement and an Amended Coordination Agreement. They maintained that approval of their agreement would improve service and competition in the U.S.-U.K. and other international aviation markets.

In connection with their alliance applications, AA/BA and United/bmi and their affiliates jointly applied for blanket statements of authorization under 14 C.F.R. part 212 and related exemption authority under 49 U.S.C. 40109 so that the parties to each alliance could engage in reciprocal code sharing.

We consolidated the AA/BA and United/bmi antitrust immunity applications and related applications for code-share authority into one proceeding, the *U.S.-U.K. Alliance Case*.

AA/BA had filed an earlier application for code-share authority for specified routes in Docket OST-1999-6507. That application was superseded by the broader application filed with their antitrust immunity application.

B. Order to Show Cause

On January 25, 2002, we issued a show-cause order stating our tentative decision on the AA/BA and United/bmi applications for approval and antitrust immunity for their respective alliance agreements and certain code-sharing authority. Order 2002-1-12. We tentatively decided to approve the AA/BA and United/bmi requests subject to conditions. These conditions included the requirement that AA/BA divest slots and facilities at London's Heathrow Airport to support 16 daily roundtrips by competing airlines and that bmi provide United with slots and facilities to support United's introduction of a second daily roundtrip between Boston and Heathrow. Our proposed action was conditioned on reaching an agreement with the United Kingdom on an Open Skies aviation agreement. We tentatively concluded that the divestiture requirements were necessary, because the relevant markets for purposes of our competition analysis included routes between the United States and Heathrow, not just routes between the United States and London. The current air services agreement between the United States and the United Kingdom is very restrictive; among other things, it allows only four airlines -- AA, United, BA, and Virgin Atlantic Airways (Virgin) -- to operate flights between the United States and Heathrow,

and we tentatively found that the record showed that acquiring the slots and related facilities needed for service to Heathrow would be difficult.

Our show-cause order invited parties to file comments or objections on our tentative findings and answers to those comments or objections by February 15 and February 25, respectively.

As we have noted earlier in this proceeding, the United Kingdom's ability to negotiate an Open Skies agreement could be affected by the European Court of Justice's decision in a pending case brought by the Commission of the European Union. The Commission has asked the Court to rule that the Commission -- not the individual member states of the European Union -- is the appropriate party to negotiate aviation relations with the United States. Order 2001-9-12 (September 17, 2001) at 4. The Court's Advocate General has issued an opinion that did not accept the Commission's arguments that only the Commission could negotiate air services agreements with countries outside the European Union, but did recommend that any agreement negotiated by a member state must meet certain conditions. The Court has not yet issued its decision.

C. Post-Show-Cause Order Developments

On January 31, 2002, Continental, Delta, and Northwest filed a motion to dismiss the *U.S.-U.K. Alliance Case*, based on the "cancellation" of Open Skies negotiations between the United States and United Kingdom They argued that the "existence of an open skies agreement is one necessary precondition for considering the approval and grant of antitrust immunity." Virgin filed an answer supporting the motion to dismiss.

AA/BA filed an answer opposing the motion to dismiss, as did Federal Express (FedEx). United/bmi also opposed the motion to dismiss. They stressed that due process should be afforded all participants, which therefore should have the opportunity to comment on the Department's show-cause order.

On February 7, 2002, the Department issued an Order Denying the Motion to Dismiss. Principally, it held that Open Skies negotiations with the United Kingdom had not been "cancelled," merely postponed. The Department therefore thought the parties should be able to comment on the show-cause order. [1]

AA/BA thereafter filed a motion to dismiss their application for approval and antitrust immunity for their alliance agreement on February 13, 2002. They stated that they would be unwilling to proceed with the alliance unless we made major changes to our proposed conditions for approval and immunity, that an order granting approval and immunity on conditions acceptable to AA/BA would likely result in lengthy litigation, and that the EU is seeking to move towards a multilateral aviation regime, which places in doubt the ability of the United States and the United Kingdom to conclude an Open Skies

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[1] Michael E. Levine filed a comment on January 29, 2002, stating his concern about the impact of approval of both alliances on competition at Heathrow. Donald J. Carty, Chairman, President, and CEO of American Airlines, filed a comment on February 1, disputing the Department's conclusions in the show-cause order.

agreement. They suggested that we suspend all further procedural dates in the *U.S.-U.K. Alliance Case* until we ruled on their motion to dismiss.

Also on February 13, 2002, Delta, Northwest, and Continental filed a motion to dismiss United/bmi's application for antitrust immunity and an answer to AA/BA's motion. They argued that AA/BA's effective abandonment of their alliance meant that no U.S.-U.K. Open Skies agreement was likely, which required the dismissal of the application of United/bmi as well.

United/bmi's answer to AA/BA's motion, filed on February 14, 2002, argued that, although the two applications were consolidated in this proceeding, they are not inexorably linked, and the "substantive basis for approving and granting immunity to each is quite distinct." Furthermore, they maintained that United/bmi were entitled to comment on the Department's show-cause order as it applies to their pending application, but that they would not oppose a limited extension of the procedural dates to accommodate comments from all parties.

FedEx filed an answer that stated its support for an extension and a U.S.-U.K. Open Skies agreement. FedEx maintained that there would be no legal obstacle to the consummation of such an agreement.

II. Summary of the Responsive Pleadings

On February 14, we issued a notice extending the procedural dates and requesting comments on "implications for proceeding to a final decision on the application of United/bmi in light of the relief requested by AA/BA." We also asked the parties to address our tentative findings on the United/bmi application.

A. Comments in Response to Department Notice

Continental argues that, unless Heathrow is open to other U.S. airlines, the approval of the alliance between United and bmi would be clearly adverse to the public interest, since United is one of the world's largest airlines and a partner in the largest immunized alliance, the Star alliance, and since bmi is the second-largest U.K. airline at Heathrow. Approval of the United/bmi alliance would be contrary to the Department's established standard for granting antitrust immunity, because entry is not possible at Heathrow.

Delta argues that, without the liberalization of the U.S.-U.K. bilateral agreement, the approval of such an alliance agreement would serve to effectively cut off access to London Heathrow for new entrants and that any petition for approval of code sharing should be dismissed or put in abeyance pending liberalization of the U.S.-U.K. bilateral agreement.

In its comments, Northwest disputes United/bmi's contention that its application is distinct from that of AA/BA. It argues that, "the need for an Open Skies agreement is a condition precedent to the approval of either alliance," and that the Department cannot grant approval in the absence of such an agreement. It also maintains that, if AA/BA or

United/bmi wish to pursue approval of code-sharing agreements under the existing U.S.-U.K. bilateral agreement, new applications should be filed.

US Airways states that the existence of an Open Skies agreement is a "fundamental prerequisite to any approval of an alliance agreement," and that, given AA/BA's motion to dismiss and the resulting improbability for Open Skies between the United States and United Kingdom, "it would be both futile for the Department and an unnecessary expenditure of time and resources to continue processing the United/bmi application." It also argues that approval of the United/bmi application would create a "price-fixing cartel" and effectively deny any entry into Heathrow for non-incumbent U.S. carriers.

FedEx, in its comments, takes no position on the merits of the United/bmi application. However, it contends that the Department should move forward with efforts to negotiate an Open Skies agreement with the United Kingdom. FedEx further complains that the Department's decision on the AA/BA alliance was unlawful.

Virgin contends that the recent opinion by the Advocate General precludes a U.S.-U.K. Open Skies agreement. Virgin also objects to the conditions in the show-cause order relating to slot divestiture, on the ground that Virgin would be the most effective competitor for a AA/BA alliance and should have been awarded slots divested from AA/BA.

United/bmi, in their comments, maintained that their applications for immunity and code sharing should be approved on the merits. They noted the Department's tentative finding that "granting antitrust immunity for the proposed alliance agreements poses no risk to competition, and that this finding was not dependent upon the conclusion of a new liberalized air services agreement with the United Kingdom." United/bmi also contended that approval is in the public interest because it would "immediately enhance passengers' service options and competition in U.S.-Heathrow markets." It also reiterated that the United/bmi application is separate and distinct from that of AA/BA. In addition, United/bmi ask that the Department "indicate its willingness to authorize bmi to operate a limited number of flights between Heathrow and points in the United States on an extra-bilateral basis." They noted that they made such a request in a separate application, filed in May of 1999, for authority to operate twice-daily nonstop flights between Heathrow and New York, and that that application is still pending.[2]

B. Replies to Comments

Delta, in its reply, responds to United/bmi's contention that we may approve their application without a U.S.-U.K. Open Skies agreement by stating that "[T]he essential predicate for approval of an immunized alliance – an Open Skies agreement – is not in effect." Moreover, it argues that the United/bmi alliance will provide no public benefit while "Delta and other US airlines remain shut out of Heathrow."

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[2] *See* Docket OST-99-5671.

Continental, in its reply, expresses strong opposition to the approval of the United/bmi application. First, it contends that United/bmi seeks approval of a "proposal incorporating new London Heathrow U.S. flights which [were] not even before the Department or the Department of Justice when they reviewed the United/bmi/Star Alliance applications." It also contends that a U.S.-U.K. Open Skies agreement is an "essential predicate for the grant of antitrust immunity", and that the proposed United/bmi alliance "would preclude bmi from providing any genuine competition, and lock other carriers out of London Heathrow." Continental also argues that none of the public benefits that normally flow from alliances would result from the approval of an immunized United/bmi alliance. Finally, Continental asserts that United/bmi's application constitutes a "plea for special relief," and should be denied in favor of a "comprehensive Open Skies solution at London Heathrow."

The City of Houston and the Greater Houston Partnership emphasize the need for the Department to continue to work towards "negotiating a U.S.-U.K. Open Skies agreement that ensures meaningful competition in the market, and which specifically prevents incumbents from leveraging their existing advantages to prevent new entry." However, "the Houston parties do not take a position as to whether the Department should continue to review the applications of United/bmi and their partners, or whether the Department should dismiss the *U.S.-U.K. Alliance Case* in its entirety in the wake of the withdrawal of the AA/BA applications."

Virgin reaffirms its position that the *U.S.-U.K. Alliance Case* should be dismissed in its entirety. It specifically addresses the contention of United/bmi that their application can be approved in absence of an Open Skies agreement, arguing that United/bmi have "misapprehended DOT policy and mischaracterized EU law." Virgin also restates its position that the EU AG's opinion effectively precludes the United Kingdom from entering into a bilateral Open Skies agreement.

FedEx reemphasizes the need to achieve an Open Skies agreement. It argues that the position of Virgin, Northwest, Delta, and Continental that the EU AG's opinion precludes a U.S.-U.K. Open Skies agreement is legally incorrect, noting that the British Government's reaction to the opinion was that the United Kingdom "had no policy that air service agreements which it concludes with the United States or any other country, should be subject to review by the European Court or the European Commission."[3]

US Airways states that the United States should seek to achieve a U.S.-U.K. Open Skies agreement, but that it does not see "any meaningful possibility" of that happening at this time. Based on the lack of such an agreement, US Airways asserts that the Department should dismiss the pending United/bmi application for antitrust immunity until a competitive market structure in which non-incumbent U.S. carriers have opportunities at Heathrow is put in place. It also believes that approval of the United/bmi application at this time would be a "devastating loss for US consumers," because it would "take away

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[3] *See* Reply of Federal Express Corporation (OST-2001-11029-113) *citing* Hansard, House of Commons, 7 Feb. 2002, Column 1109 W: Reply to written question submitted by Chris Grayling MP to the Hon. John Spellar, Transport Minister (text omitted).

any incentive the British have (and any leverage the US has) to negotiate a new agreement."

United/bmi reemphasize their earlier observation that the Department found that their proposed alliance poses no risk to competition. They also reaffirm their position that a U.S.-U.K. Open Skies agreement is not a "per se" requirement to the grant of antitrust immunity, and that approval of their application would increase competition on U.S.-Heathrow routes and pressure for liberalization. Additionally, they argue that "U.S. carriers currently unable to operate at Heathrow (including Continental, Delta, Northwest, and US Airways) cannot demonstrate that they would suffer any cognizable competitive harm as a result of approval" of their application. They respond to Continental's objection to the approval of code-sharing agreements between the two carriers by pointing out that "Continental has placed its code on Virgin Atlantic's Heathrow-U.S. services, and continues to do so today." Continental therefore cannot argue that code sharing is inherently contrary to the public interest.

On March 11, 2002, American and British Airways filed a joint motion to dismiss their code-share application in Docket OST-1999-6507. They submitted no comments on the United/bmi application or on our show-cause order in response to our February 14 notice requesting comments.

III. Decisional Standards under 49 U.S.C. Sections 41308 and 41309

United/bmi applied for approval of and antitrust immunity for Alliance Agreements under 49 U.S.C. §§ 41308 and 41309, whereby they will plan and coordinate service over their respective route networks as if there had been an operational merger between the partners.

Under 49 U.S.C. § 41308, the Department has the discretion to exempt a person affected by an agreement under § 41309 from the operations of the antitrust laws "to the extent necessary to allow the person to proceed with the transaction," provided that the Department determines that the exemption is required in the public interest. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. We are willing to make exceptions, however, and grant immunity, if the parties to such an agreement would not otherwise go forward without it, and if we find that the public interest requires that we grant antitrust immunity.

Under 49 U.S.C. § 41309, the Department must determine, among other things, that an inter-carrier agreement is not adverse to the public interest before granting approval. The Department also may not approve an inter-carrier agreement that substantially reduces or eliminates competition unless the agreement is necessary to meet a serious transportation need or to achieve important public benefits, if that need cannot be met, or those benefits achieved, by reasonably available alternatives that are materially less anticompetitive. The public benefits include international comity and foreign policy considerations.

The parties opposing the agreement have the burden of proving that it substantially reduces or eliminates competition and that less anticompetitive alternatives are available.

If the record shows that the agreement will substantially reduce or eliminate competition, the party defending the agreement or request has the burden of proving the transportation need or public benefits.

IV. Decision

A. Motions of American Airlines and British Airways

We have decided to grant the motion filed by AA/BA to dismiss their joint application in the *U.S.-U.K. Alliance Case* and their motion to withdraw their application for code-sharing authority in Docket OST-1999-6507. No party has objected to the AA/BA requests and we find that it is in the public interest to grant them.[4]

B. Motion of Continental, Delta and Northwest to Dismiss United/bmi

We have decided to deny this motion. We disagree with the argument that the decision of AA/BA to seek dismissal of their application eliminates the possibility of a U.S.-U.K. Open Skies agreement. United/bmi remain committed to the implementation of their proposed alliance, and we believe that their commitment could provide the opportunity to achieve an Open Skies agreement. In this regard, we note that the U.K.'s Transport Minister has recently stated that the United Kingdom retains the right to negotiate and conclude an Open Skies agreement with the United States subject to meeting its obligations under Community Law.[5]

C. Applications of United, bmi, and Affiliates

We have decided to approve and grant antitrust immunity to the proposed United/bmi Alliance Agreements and to approve United/bmi's request for blanket code-share and related exemption authority subject to the terms and conditions proposed in our show-cause order,[6] and the requirement that, within six months from the date of the issuance of this Order, the United States achieves an Open Skies agreement with the United Kingdom that meets U.S. aviation policy objectives. Our approvals and grant of immunity will not become effective until 30 days after that agreement is achieved.

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[4] We note that the Record contains a letter from the Chairman of American Airlines to the Secretary of Transportation, dated February 1, 2002. While we find it unnecessary to respond formally, we are concerned by the letter's intemperate tone, and remind participants in our proceedings of our rules regarding standards of conduct (14 CFR 300.6; 300.20).

[5] Hansard, House of Commons, 7 Feb. 2002, Column 1109 W: Reply to written question by Hon. John Spellar, Transport Minister: "We do not yet have a ruling from the European Court of Justice. That is probably months away. What we do have is the Opinion issued on 31 January by the Advocate General which comprises his advice to the Court. According to his Opinion it remains open to member states to negotiate and conclude open skies agreements with the United States subject to meeting their obligations under Community law."

[6] However, we will not make our approval and grant of immunity to the United/bmi alliance agreements contingent upon the intra-alliance transfer of slots and facilities as proposed in our show-cause order. Our decision to dismiss the AA/BA alliance agreements removes the basis for that proposed condition.

1. Competition Considerations

In our show-cause order we tentatively found that implementation of the proposed United/bmi alliance would not eliminate or substantially reduce competition in any relevant market. As we determined in our tentative decision, the existing U.S.-U.K. aviation agreement (Bermuda 2) bars bmi from entering any U.S.-Heathrow market, and bmi currently serves no U.S.-London market. Therefore, bmi is not an actual or potential competitor in these markets. Order 2002-1-12 at 52. The alliance between United and bmi thus will not eliminate any actual or potential competition in the relevant markets.

Continental maintains that in responding to our Notice, United/bmi have requested extra-bilateral authority to provide service between Heathrow and points in the United States, and that this recent request makes it clear that bmi is a potential entrant in U.S.-Heathrow markets now served by United.

We do not agree with Continental's argument. Our examination of the UA/bmi request for authority to serve the U.S.-Heathrow market with its own aircraft indicates that bmi seeks this authority so that it can serve U.S.-Heathrow markets only on an extra-bilateral basis in conjunction with its proposed alliance with United. Since we would not grant bmi extra-bilateral operating authority under the existing restrictive regime, Continental's argument is moot and bmi is not a potential entrant under the existing bilateral. Further, there is no change in our finding that bmi would not enter U.S.-Heathrow markets under an Open Skies regime independent of its immunized alliance and code share agreements with United. Therefore, there is no change in our conclusion that bmi is not a potential entrant in these markets.

Since no party has demonstrated error in our tentative findings on the competitive effects of the proposed United/bmi alliance, we shall make them final.[7]

2. Public Interest Considerations

We have determined that it is in the public interest to approve and grant antitrust immunity to the proposed United/bmi alliance, subject to the conditions imposed by this Order. As stated in our show-cause order, replacing the restrictive Bermuda 2 aviation agreement with an Open Skies agreement would provide important public benefits. We believe that our final decision in this proceeding could help the United States achieve Open Skies with the United Kingdom.

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[7] In our show-cause order we had proposed requiring that the Alliance Agreements be resubmitted for review after three years rather than the five years directed in previous alliance cases. We did so in the context of our tentatively approving alliances that involved two of the U.K.'s airlines. By the present order we are dismissing the AA/BA Alliance application, and only the UA/bmi Alliance remains before us. This alliance involves only a single U.K. carrier and does not prompt comparable competitive concerns. Against this background, we regard the five-year review period as consistent with our policies and the public interest.

We have also determined that approval of the United/bmi alliance is consistent with our policy of promoting pro-competitive and pro-consumer international aviation alliances. See Order 2001-12-18 at 17. United/bmi asserted (United/bmi joint application at 42-45) that implementation of the proposed United/bmi alliance would permit the parties to use their airport hubs to better integrate their now separate route systems, and that this would increase travel options and competition in U.S.-transatlantic markets. We saw nothing in the record to persuade us to the contrary. While the Star Alliance, which includes United, Lufthansa, and SAS, among other airlines, already operates an extensive integrated network connecting points in the United States with points in Europe, the addition of bmi to the immunized alliance will benefit travelers by providing additional service options.

However, we do not believe that it is in the public interest to permit United/bmi to implement their proposed alliance before we achieve Open Skies with the United Kingdom because that approach would materially reduce the incentives that we have determined are needed to achieve that result. Our grant of approval and antitrust immunity accordingly will become effective only after the United States has achieved an Open Skies agreement with the United Kingdom that meets our aviation policy objectives. By thus conditioning the effectiveness of our approval and antitrust immunity, we are fully complying with our long-established policy that a U.S. airline and a foreign airline may obtain the authority to operate an immunized alliance only when the United States has an Open Skies agreement with the foreign airline's homeland. Our action is also consistent with the position of several parties in this proceeding that United/bmi should not be able to operate an immunized alliance in the absence of an Open Skies agreement with the United Kingdom.

V. Antitrust Immunity

We finalize our tentative decision that antitrust immunity is required in the public interest.

In our show-cause order we tentatively found that the Alliance Agreements will neither substantially reduce nor eliminate competition. Nevertheless, we also tentatively found that the Joint Applicants could be subject to expensive and burdensome antitrust litigation if we did not grant their request, and that they would not proceed with their Alliance Agreements without immunity. No party has presented any facts or arguments that warrant a change in our tentative decision. Accordingly, we grant antitrust immunity to the Alliance Agreements, subject to the conditions provided in this decision.

ACCORDINGLY,

1. We grant the motion of American Airlines, Inc. and British Airways Plc to dismiss their application in Docket OST-2001-11029;

2. We grant the motion of American Airlines, Inc. and British Airways Plc to dismiss their code-share application in Docket OST-1999-6507;

3. We deny the motion of Continental Airlines, Inc., Delta Air Lines, Inc. and Northwest Airlines, Inc. in Docket 0ST-2001-11029 to dismiss the applications of United Air Lines, Inc., British Midland Airways Limited d/b/a bmi British Midland and their affiliates;

4. We approve and grant antitrust immunity, as discussed in this order, to the Alliance Agreements among United Air Lines, Inc., British Midland Airways Limited d/b/a bmi British Midland, Austrian Airlines Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa, AG, and Scandinavian Airlines Systems, and their wholly-owned affiliates, insofar as they relate to foreign air transportation. The approval and grant of immunity is subject to the conditions that the United States achieves, within six months from the issue date of this order, an Open Skies agreement with the United Kingdom that meets U.S. aviation policy objectives, and that the antitrust immunity will not cover any activities of the Joint Applicants as owners or marketers of computer reservation systems businesses;

5. We direct United Air Lines, Inc., British Midland Airways Limited d/b/a bmi British Midland, Austrian Airlines Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa, A.G., and Scandinavian Airlines System, and their wholly-owned affiliates, to resubmit for review their Alliance Agreements five years from the date of issue of the final order in this case;

6. We direct United Air Lines, Inc., British Midland Airways Limited d/b/a bmi British Midland, Austrian Airlines Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa, A.G., and Scandinavian Airlines System, and their wholly owned affiliates, to submit any subsequent subsidiary agreements implementing their Alliance Agreements for prior approval;[8]

7. We direct United Air Lines, Inc., British Midland Airways Limited d/b/a bmi British Midland, Austrian Airlines Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa, A.G., and Scandinavian Airlines System, and their wholly-owned affiliates, to withdraw from participation in any International Air Transport Association (IATA) tariff conference activities that discuss any proposed through fares, rates or charges applicable between the United States and the United Kingdom, Austria, Germany, Sweden, Denmark, Norway, and/or between the United States and any other countries whose designated carriers participate in similar agreements with U.S. airlines that have been or are subsequently granted antitrust immunity by the Department;

8. We direct United Air Lines, Inc., British Midland Airways Limited d/b/a bmi British Midland, Austrian Airlines Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa, A.G., and Scandinavian Airlines System, and their wholly-owned affiliates, to report full-itinerary Origin-Destination Survey of Airline Passenger Tariff for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by United Air Lines, Inc.). The full itinerary record is defined as the

[8] Regarding this requirement, we do not expect the Joint Applicants to provide the Department with minor technical understandings that are necessary to implement fully their day-to-day operations but that have no additional substantive significance. We do, however, expect and direct them to provide the Department with all contractual instruments that may materially alter, modify, or amend the Alliance Agreements.

passenger's complete itinerary from origin to destination as opposed to the abbreviated gateway record reported under T100(f);

9. We direct United Air Lines, Inc., British Midland Airways Limited d/b/a bmi British Midland, Austrian Airlines Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa, A.G., and Scandinavian Airlines System, and their wholly-owned affiliates, to obtain prior approval from the Department if they choose to operate or hold out service under a common name or use "common brands";

10. We delegate to the Director, Office of International Aviation, the authority to determine the applicability of the directive set forth in ordering paragraph 7 above to specific prices, markets, and tariff coordination activities, consistent with the scope and purpose of the condition, as previously described;

11. We grant United Air Lines, Inc. an exemption under 49 U.S.C. § 40109 for a period of two years to provide scheduled foreign air transportation of persons, property, and mail between any point or points in the United States and via intermediate points to a point or points in the United Kingdom and beyond, subject to the attached conditions and the other provisions of this order;

12. We grant British Midland Airways Limited d/b/a bmi British Midland an exemption under 49 U.S.C. § 40109 for a period of two years to provide scheduled foreign air transportation of persons, property, and mail between any point or points behind the United Kingdom via the United Kingdom and intermediate points to a point or points in the United States and beyond, subject to the attached conditions and the other provisions of this order;

13. We grant United Air Lines, Inc. a Statement of Authorization under 14 CFR Part 212 for an indefinite period to display bmi's "BD" designator code in conjunction with foreign air transportation of persons, property, and mail on flights operated by United between (1) points in the United States; (2) points in the United States and points in the United Kingdom (either nonstop or via intermediate points in third countries); (3) points in the United States and points in third countries; and (4) points in the United Kingdom and points in third countries, subject to the attached conditions and the other provisions of this order;

14. We grant British Midland Airways Limited d/b/a bmi British Midland a Statement of Authorization under 14 CFR Part 212 for an indefinite period to display United's "UA" designator code in conjunction with foreign air transportation of persons, property, and mail on flights operated by bmi between (1) points in the United Kingdom; (2) points in the United Kingdom and points in the United States (either nonstop or via intermediate points in third countries); (3) points in the United Kingdom and points in third countries; and (4) points in the United States and points in third countries, subject to the attached conditions and the other provisions of this order;

15. The provisions of ordering paragraphs 1, 2 and 3 above will become effective immediately;

16. The provisions of ordering paragraphs 4 through 14 above will become effective 30 days after a U.S.-U.K. Open Skies agreement that meets U.S. aviation policy objectives is achieved;

17. We may amend, modify, or revoke this authority at any time without hearing;

18. We deny all other motions in this proceeding, unless specifically granted; and

19. We shall serve a copy of this order on the parties to this proceeding, the Ambassador of the United Kingdom of Great Britain and Northern Ireland in the United States; the Department of State; and the Federal Aviation Administration.

By:

READ C. VAN DE WATER
Assistant Secretary for Aviation
and International Affairs

(SEAL)

An electronic version of this document is available on the World Wide Web at
http://dms.dot.gov//reports/reports_aviation.asp

Posted: April 4, 2002
9:00 a.m.

U.S. CARRIER
Standard Exemption Conditions

In the conduct of operations authorized by the attached order, the applicant(s) shall:

(1) Hold at all times effective operating authority from the government of each country served;

(2) Comply with applicable requirements concerning oversales contained in 14 CFR 250 (for scheduled operations, if authorized);

(3) Comply with the requirements for reporting data contained in 14 CFR 241;

(4) Comply with requirements for minimum insurance coverage, and for certifying that coverage to the Department, contained in 14 CFR 205;

(5) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR 203, concerning waiver of Warsaw Convention liability limits and defenses;

(6) Comply with the applicable requirements of the Federal Aviation Administration Regulations and with all U.S. government requirements concerning security; and

(7) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department of Transportation, with all applicable orders and regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

The authority granted shall be effective only during the period when the holder is in compliance with the conditions imposed above.

FOREIGN AIR CARRIER CONDITIONS OF AUTHORITY

In the conduct of the operations authorized, the holder shall:

(1) Not conduct any operations unless it holds a currently effective authorization from its homeland for such operations, and it has filed a copy of such authorization with the Department;

(2) Comply with all applicable requirements of the Federal Aviation Administration, including, but not limited, to 14 CFR Parts 129, 91, and 36;

(3) Comply with the requirements for minimum insurance coverage contained in 14 CFR Part 205, and, prior to the commencement of any operations under this authority, file evidence of such coverage, in the form of a completed OST Form 6411, with the Federal Aviation Administration's Program Management Branch (AFS-260), Flight Standards Service (any changes to, or termination of, insurance also shall be filed with that office);

(4) Not operate aircraft under this authority unless it complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention;

(5) Conform to the airworthiness and airman competency requirements of its Government for international air services;

(6) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses;

(7) Agree that operations under this authority constitute a waiver of sovereign immunity, for the purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are:

> (a) based on its operations in international air transportation that, according to the contract of carriage, include a point in the United States as a point or origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States; or
>
> (b) based on a claim under any international agreement or treaty cognizable in any court or other tribunal of the United States.

In this condition, the term "international air transportation" means "international transportation" as defined by the Warsaw Convention, except that all States shall be considered to be High Contracting Parties for the purpose of this definition;

(8) Except as specifically authorized by the Department, originate or terminate all flights to/from the United States in its homeland;

(9) Comply with the requirements of 14 CFR Part 217, concerning the reporting of scheduled, nonscheduled, and charter data;

(10) If charter operations are authorized, comply (except as otherwise provided in the applicable bilateral agreement) with the Department's rules governing charters (including 14 CFR Parts 212 and 380); and

(11) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

This authority shall not be effective during any period when the holder is not in compliance with the conditions imposed above. Moreover, this authority cannot be sold or otherwise transferred without explicit Department approval under Title 49 of the U.S. Code (formerly the Federal Aviation Act of 1958, as amended).

Posted: April 4, 2002
9:00 a.m.

STATEMENT OF AUTHORIZATION CONDITIONS

(a) The statements of authorization will remain in effect only as long as (i) United and bmi continue to hold the necessary underlying authority to operate the code-share services at issue, and (ii) the code-share agreement/alliance agreement providing for the code-share operations remains in effect.

(b) United and/or bmi must promptly notify the Department (Office of International Aviation) if the code-share/alliance agreement providing for the code-share operations is no longer effective or the carriers decide to cease operating any or all of the approved code-share services.[1] (Such notice should be filed in Docket OST-2001-11029.)

(c) United and bmi must notify the Department no later than 30 days before they begin any new-code service under the code-share services authorized here. Such notice shall identify the market(s) to be served, which carrier will be operating the aircraft in the code-share market added, and the date on which the service will begin. (Such notices should be filed in Docket OST-2001-11029)

(d) All operations conducted under this authorization must comply with the terms, conditions, and limitations of this order granting the United and bmi antitrust immunity and any subsequent orders of the Department regarding the alliance.

(e) The code-sharing operations conducted under this authority must comply with Part 257 and with any amendments to the Department's regulations concerning code-share arrangements that may be adopted. Notwithstanding any provisions in the contract between the carriers, our approval here is expressly conditioned upon the requirements that the subject foreign air transportation be sold in the name of the carrier holding out such service in computer reservation systems and elsewhere; that the carrier selling such transportation (*i.e.* the carrier shown on the ticket) accept responsibility for the entirety of the code share journey for all obligations established in its contract of carriage with the passenger; and that the passenger liability of the operating carrier be unaffected. Further, the operating carrier shall not permit the code of its U.S. code-sharing carrier to be carried on any flight that enters, departs, or transits the airspace of any area for whose airspace the Federal Aviation Administration has issued a flight prohibition.

(f) The authority to operate to third countries is subject to the condition that any service provided under the statement of authorization shall be consistent with all applicable agreements between the United States and the foreign countries involved. Furthermore, (i) nothing in the award of this blanket statement of authorization should be construed as conferring upon United rights (including code-share, fifth-freedom intermediate and/or beyond rights) to serve markets where U.S. carrier entry is limited unless United notifies the Department of its intent to serve such a market and unless and until the Department

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[1] We expect this notification to be received within ten (10) days after such non-effectiveness or of such decision.

has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights;[2] and (ii) should there be a request by any carrier to use the limited-entry route rights that are included in United's authority by virtue of the blanket statement of authorization granted here, but that are not then being used by United, the holding of such authority will not be considered as providing any preference for United in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue.

(g) The authority granted here is specifically conditioned so that neither United nor bmi shall give any force or effect to any contractual provisions between themselves that are contrary to these conditions.

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[2] The notice in paragraph (c) above can be used for this notification.